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The Nation as ‘the Public’: the resilient functionalism of public law

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Abstract

This paper defends the resilience of the concept of public law in the context of privatization on the one hand and globalization on the other. National identity and its relationship to public law can be situated in the context of each of these processes of change, but the highly particular relationship between the nation and the state which emerged with the modern, classical form of public law is in many ways a discrete concern, not unaffected by privatization or globalization, but sufficiently robust to remain the central dynamic in legitimising democratic rule today. Although the relationship between a people and its polity is inevitably affected by normative developments beyond the state and by the arguably diminishing public space within it, there is also and perhaps paradoxically considerable evidence pointing to the resilience of national identities and the power of states; trends which challenge the early 21st century prognosis that we have entered a post-national era. The primary focus of the paper is upon the 'resilient functionalism' of public law in continuing to support the important relationship between the nation and the state. It begins by outlining the functionalism of public law in its broadest sense, tracing its historical development as a discrete subject. Secondly, it explores further how public law's primary role in the modern era has been to facilitate the relationship between national identity and the state. And thirdly, it offers empirical evidence to defend the 'resilience thesis' and the ongoing importance of public law as facilitator of the continuing, albeit changing, relationship, between nation, national identity and state.

Keywords

Law; Public law; constitutional law; privatization; globalization; nation; nation-state; national identity; nationalism; state; post-national; resilient functionalism; functionalism; constitution; constitutionalism; sovereignty; post-sovereign; popular sovereignty; referendums; democracy; direct democracy; plurinational states; multinational states.

The Nation as ‘the Public’: the resilient functionalism of public law*

I. Introduction

The notion that the age of public law has somehow passed or is passing recalls persistent claims that the age of the nation state and the nation itself is also drawing to a close. I have elsewhere argued that these latter claims are over-stated¹, and in this chapter I will challenge the notion that somehow the role for public law is likewise being undermined. In doing so I will draw parallels between both sets of claims and in turn will suggest that the resilience of both the nation and public law is, through the functional role the latter serves, in fact relational.

I will address the resilience of the concept of public law in the context of privatization on the one hand and globalization on the other. The former, for our purposes, has involved the hollowing out of the public sphere and the concomitant diminution of the role of the state in regulating areas of private activity, particularly in the economic arena; the latter is an increasingly inchoate term, but again for the legal theorist it refers to those new transnational normative structures which challenge, and in some ways already supplant, the state’s authority from the outside. National identity and its relationship to public law can be situated in the context of each of these processes of change, but the highly particular relationship between the nation and the state which emerged with the modern, classical form of public law, must be presented as in many ways a discrete concern, not unaffected by privatization or globalization, and yet also sufficiently robust and distinctive to raise specific issues for how we understand public law and its continuing relevance and resilience today. My concern in this chapter is to re-emphasise the extent to which ties of identification and loyalty between a people – and in some cases a number of peoples – and the constitutional order and public law system of a particular polity remain strong, as in many respects do the states themselves which host these ties, and that ‘classical’ systems of public law therefore remain central in managing these polities. Although the relationship between a people and its polity is inevitably affected by changing dynamics beyond the state and by the arguably diminishing public space within it, there is also and perhaps paradoxically considerable evidence pointing to the resilience of national identities and the power of states; dynamics which challenge the early 21st century prognosis that we have entered a post-national era.

This argument for the resilience of the nation–state nexus leads me to situate the chapter within ‘the domain of public law’. The introductory chapter to this collection adopts this term in calling for reflection on the point and worth of the ethical and political project that public law embodies. And here my primary focus will be upon the functionalism or what I will call the ‘resilient functionalism’ of public law in continuing to support the important relationship between nations and states. I will begin by outlining what I understand by the functionalism of public law in its broadest sense, tracing very briefly its historical development as a discrete subject. Secondly I will explore further how public law’s primary function in the modern era has been to facilitate the relationship between national identity and the state. And thirdly, I will

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¹ S Tierney, *Constitutional Law and National Pluralism* (Oxford, OUP, 2004).

offer empirical evidence to defend the ‘resilience thesis’ and the ongoing importance of public law as facilitator of the continuing, albeit changing, relationship, between nation, national identity and state.

II. Nation – state: the functionalism of public law

The resourcefulness of public law is to be found in its functional role as a form of practice per Loughlin’s ‘broad conception of public law as one that encompasses all the rules, principles, habits and practices that sustain the autonomy of the world of the political’.² Public law in this sense is the husbanding of public power, but it is not a process that does or can insulate public power from political forces. This political functionalism of public law leads us to two important implications for the purposes of this book. The first is that as a form of practice, public law is a product of lived, historical experience. It is in this sense bound up with the political reality of power. Where public power exists in whatever form, then a system of public law will invariably emerge to facilitate and regulate it, and so public law as a form of management of public power has ancient origins. Although the modernist functionalism of public law as we understand it today is bound up with the birth of the nation-state, the management of public power itself long predates this. With the development of social organisation beyond the tribe there has been some conceptualisation of a public that is abstracted from the bonds of kinship; the sphere – however articulated – that transcends private relations. And indeed a notion of the public, albeit very different from our modern conception, has thus been identified in the ancient world.³ And with this abstraction has come the need for a society to manage the power exercised therein; in short we might say, so long as there is a public sphere there will be public law.

The second implication is that public law adapts to the particular functions it needs to perform. Public power manifests itself in different ways and so too does public law from time to time and place to place. I use the term ‘managing’ public power because this connotes two separate but related functions which, acting symbiotically but also in tension one with the other, continue to define the role of public law: facilitation and restraint. This dual and at times Janus-faced functionalism of public law has provided the environment for the prudent exercise of public power, while also controlling excesses committed in its name;⁴ in other words, public law offers us a vision of public power as both a promise and a threat, varying in form by these markers from system to system.⁵

² M Loughlin, ‘Towards a Republican Revival?’ (2006) 26 OJLS 425, 436.

³ A Lanni and A Vermeule, Constitutional Design in the Ancient World (January 24, 2011). Stanford Law Review, Forthcoming; Harvard Public Law Working Paper No. 11-06. Available at SSRN: <http://ssrn.com/abstract=1747087> accessed 16 January 2012; R C Van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge, CUP, 1995), Introduction.

⁴ C Harlow and R Rawlings, ‘Red and Green Light Theories’, in *Law and Administration*, Third Edition (Cambridge, CUP, 2009), 1-48.

⁵ One of the fascinating while frustrating features of our discipline is its propensity to throw paradoxes at us; the imperfect world of public law as political praxis leaves us with loose ends that are only avoidable in the ideal world of normative political theory. In many ways this is a premise, and implied by the title, of a recent important collection: M Loughlin and N Walker eds., *The Paradox of Constitutionalism* (Oxford, OUP, 2007).

Understood then as a tool of management other things flow, in particular the institutional structure for power management. And here through our modernist lens we locate the state, emerging in the late middle ages and maturing in the nineteenth century. The state is both itself the pre-eminent institutional form embodying the higher order legal norm that somehow sustains its own sovereignty⁶ and at the same time the receptacle for governmental institutions which generate second order norms. And with the establishment of institutions of government suitable for managing a large polity has come the delineation of the myriad ancillary functions that need to be performed by the state: representation, legislation, government, responsibility, adjudication etc. And accordingly, so too have been developed doctrines that manage relations among those institutions – separation of powers, checks and balances, rule of law; the legal concept of citizenship to establish the boundaries and qualification for individual membership and non-membership in the polity; and the establishment of a concept of hierarchy of laws from the ordinary to the constitutional to provide an internal circle of authority establishing legal authority, finality but also adaptability.

Therefore, the modernist or classical model of public law with which we deal today has been tailored to suit the social conditions which themselves brought about the state: the imperial accretion of territory and the consolidation of the membership, identity and loyalty of disparate peoples brought together by this process; in a more economically determinist take Laski argued constitutional law is only meaningful when understood as the expression of an economic system of which it was designed to serve as a rampart.⁷ But crucially for this book it is the insight that we can only understand public law by the *political* function it performs that also inspires the idea that our age is somehow ‘after public law’ or approaching such a condition. As the legal competence of the state as unitary and omnipotent receptacle of sovereignty is constricted by new competences beyond the state and the diminishing capacity of statal public institutions in the face of lateral privatisation, then the function of public law as tool of state management is, it seems, diminishing. And there is no doubt that the state, at least in much of Europe, has lost and continues to lose much of its formerly exclusive normative purchase as public functions move to supra-state institutions where they must be managed in concert with others. We must not lose sight of the point that while public law is, given the nature of its function, in a sense timeless, its instantiation and the specific purposes it serves, has varied from time to time and place to place. And it is its inherently political dynamic that now leads me in the next section to extrapolate to the link between state and nation in the modernist manifestation of public law and in due course to an account of public law’s resilient functionalism in the face of a seemingly linear trend to a post-state and post-public law world.

III. A Function of Modern Public Law: the nation and its identity

The state has emerged to govern large numbers of people and the normative resource it has called upon to facilitate this is the politico-legal hybrid, sovereignty. But it is one thing to assert sovereignty; a particular task of the state has been to foster bonds of loyalty among its members both to the state and to its governmental institutions, without which sovereignty would be considerably harder to sustain. A key device in

⁶ J Elster, ‘Constitutional bootstrapping in Paris and Philadelphia’, (1992-93) 14 *Cardozo Law Journal* 549.

⁷ H Laski, *A Grammar of Politics* (London, Allen and Unwin, 1925) 578.

producing these bonds has been the somewhat inchoate notion of national identity. At one level sovereignty can be viewed as the monopoly over the control and application of public power. But sovereignty is misconceived if it is presented only as overwhelming *authority by the state over the people* in the Hobbesian sense.

Here Kalyvas reminds us that we should think of sovereignty as legitimiser as well as sovereignty as power in his distinction between ‘command sovereignty’ and ‘constituent sovereignty’.⁸ The former is the classical model of the final word, central to modernist accounts of the legal system as *Rechtsstaat*. Within the Westphalian tradition of state-building, as conceptualised by Kelsen and Hart, it is considered that any legal order must have an absolute and final arbiter, and hence the sovereign is characterised, for example by de Spinoza, as he who ‘has the sovereign right of imposing any commands he pleases’.⁹ Constituent sovereignty, however, is for Kalyvas a neglected model which is concerned not with ‘coercive power’ but rather ‘constituting power’: ‘Thus, contrary to the paradigm of the sovereign command that invites personification and can better be exercised by an individual who represents and embodies the unity of authority – from the ancient imperatore to the king to the modern executive – the constituent power points at the collective, intersubjective, and impersonal attributes of sovereignty, at its cooperative, public dimension.’¹⁰ This involves seeing the sovereign as ‘constituent subject’, as the one who shapes not only the governmental structure of a community but also its juridical and political identity;¹¹ in other words, as the source of the constitution and of its authority.

This mirrors the two-dimensional aspect of public law as both facilitator of and limitation to the exercise of public power. Sovereignty as the ultimate source of authority for public law facilitates its voluntary, popular feature alongside its coercive dynamic. It is not simply something to be borne out of sufferance, coercion being the unfortunate side-effect of the benefits accruing from the modern state. It is also the life-blood of the polity which gives it its popular impetus and which makes the life lived as a public actor and citizen rewarding and enhancing. The state can be a *res publicae* – genuinely a thing of the public – within which the public has the power to create, and indeed constantly recreate, the state in its own image.

Thus the key feature upon which the modern functionalism of public law has come to rely is legitimacy, and this notion has been shaped by a growing association between the modern state on the one hand and democracy, defined as popular government and even popular sovereignty, on the other. Sovereignty in the modern era has come to rest upon consent, *the rule of the people over the state* mirroring *authority by the state over the people*. And it is in the context of democracy’s emergence as the dominant ideology of state legitimacy that we need to situate also the link between public law and national identity, which is crucial also to appreciating how modernist sovereignty has developed its double-sided character.

Since a vital task of the modern state has been to legitimise its claim to a monopoly in the management of public power, and since in doing so by any means short of

⁸ A Kalyvas, ‘Popular Sovereignty, Democracy and Constituent Power’ (2005) 12 *Constellations* 223, 224.

⁹ B de Spinoza, *A Theologico-Political Treatise*, tr. R.H.M. Elwes (New York, Dover, 1951) 207.

¹⁰ Kalyvas op cit 235-236.

¹¹ Kalyvas op cit 226.

absolute dictatorship it has needed to find a way to harness the identity and loyalty of its subjects, the resource adapted to this task more than any other is the concept of the nation.¹² This idea is vast in its complexity as recent decades of intense academic interest have illustrated. At the first order level, what is the nation? Is it simply a synonym for the people of a particular state, as we see it constructed within classical French constitutionalism? Or must we disentangle the concept of nation from the state and consider it to manifest itself in more organic sociological terms, at some level of detachment from the institutional construction of the polity? But when we move beyond the perfect mapping of state to nation, looking for a meaning of the latter in sociological terms it is clear that consensus on what constitutes a nation is impossible to find; as seen for example in international law's failure to define the term 'national minority'.¹³

Among sociologists, the key debate takes place upon the spectrum of instrumentalism, with the nation considered to be more or less the instrumental outcome of other social phenomena. At one end of this spectrum the nation is the functional creation of the state. This is a form of modernist thinking which we find for example among Marxist thinkers like Hobsbawm.¹⁴ The nation as a vehicle for collective identity has little or no self-generated life of its own. It is contingent upon the functioning of the polity which it supports and just as it was manufactured to support the modern capitalist state so too would it disappear as it ceased to serve such any useful function, supplanted as many Marxists supposed by the triumph of a particular internationalised social class. At the other extreme are what we might call the ethno-essentialists who consider the nation to be deep-rooted in largely immutable social attachments built up through shared experiences over centuries and founded at least in part upon inherent markers of ethnic particularity; in other words political institutions emerged to serve rather than to shape the nation and could not of themselves either create or transform the structure of the nation in any meaningful way.

Much of the literature within nationalism studies since the 1960s has tended to try and make sense of some middle ground, offering a variety of alternative accounts¹⁵ that seek to grasp the modernism, instrumentalism and contingency of nationalism which has made it a particularly useful ideological vehicle for the large-scale state, while recognising also that individual states constructed nations upon sites of identity which did in many cases pre-date the state; in other words the modern state appropriated more or less these older attachments together with the languages and cultures that had developed within nascent national communities, adapting and consolidating these identities to suit an emerging constitutional identity for the large-scale polity. The

¹² E J Weber, *Peasants into Frenchmen: The modernization of rural France, 1870-1914* (London : Chatto and Windus, 1977)

¹³ No international instrument even those which expressly address minority rights attempts such a definition.

¹⁴ EJ Hobsbawm, *The Age of Revolution: Europe 1789-1848* (London, Abacus, 1962); *Nations and Nationalism Since 1780: programme, myth, reality* (Cambridge, CUP, 1991).

¹⁵ M Billig, *Banal Nationalism* (London, Sage, 1995); J Breuilly, *Nationalism and the State*, 2nd edn. (Manchester, Manchester University Press, 1993); R Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge, CUP, 1996); E Gellner, *Nations and Nationalism* (Oxford, Blackwell, 1983); T Nairn, *Faces of Nationalism: Janus revisited* (London, Verso, 1997); and A D Smith, *Nations and Nationalism in a Global Era* (Cambridge: Polity Press, 1995).

nation was instrumentally useful and in some cases had indeed been ‘forged’,¹⁶ but it has also relied upon cultural and ethnic markers that pre-dated the state it was adapted to serve. Particular nations therefore can be situated on a scale moving from the more manufactured or ‘imagined’¹⁷ to those which built more upon pre-existing identity patterns. But this scale is more or less not either/or; each nation to differing extents and in differing ways combine attributes that on the one hand pre-date the nation-building dynamic of modernism and the on the other have been shaped by the institutional structures and ideologies this dynamic brought with it.

Therefore, the important work that has formed our contemporary understanding of the complexity of the nation is that which, particularly in the ground-breaking efforts of Anthony Smith, offers a nuanced and complex account, calling into question any essentialist vision of the nation as inherently ethnic and eternal but also questions crude assumptions that it is simply an invented construct of the modernist state which might serve a function for a time before being self-consciously ditched in favour of a more suitable construction for a post-state era. This presents a challenge for notions that we are moving beyond public law. If the nation is not just constructed, does it merely serve the state? Or does to some extent the state also serve the nation, providing a set of institutions which allows it to set its own priorities, and represent its own identity? If the latter, mixed account, is more accurate, then we need to think about how the contemporary functionalism of public law comes to facilitate a still important, albeit in some ways and some cases changing, relationship between state and nation, a relationship which we should not be too hasty to assume has run its course.

IV. The Changing Functionalism of Statal Public Law

National identity is generally agreed, at least by all but the most extreme ethno-nationalists, to be partly functional. In today’s condition of global normative flux therefore we need to take stock in order to ask what role it has played, and how might this role be changing as we see the functions of public law within the state also develop. In the remainder of the chapter I will consider empirical evidence which seems to suggest that both the nation and the state, in mutually supportive ways, retain considerable resilience today.

The resilience of the nation

The 20th century expectation that the nation as a focus for people’s public identities would wane was in large part the consequence of eliding an ought with an is. It was hoped the nation would diminish and in part expectations were built upon this. A very understandable reason for this aspiration was the loss of moral capital the nation suffered particularly in the early part of that century through its association with the much corrupted currency of nationalism.¹⁸ Indeed the sense that the nation and in

¹⁶ L Colley, *Britons: Forging the Nation 1707-1837* (New Haven and London, Yale University Press, 1992).

¹⁷ B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).

¹⁸ A common assumption left by the bitter ethnic hatreds of the last century posits nationalism and liberalism as inherently incompatible. F A Hayek, *The Constitution of Liberty* (London, Routledge & Kegan Paul, 1960) 14–15; H Arendt, *On Revolution* (London, Penguin, 1963) 163; D Miller, *On*

particular nationalism as an ideology, or more accurately as a mode of structuring public identities, was increasingly revanchist and out-moded was one of the few commitments shared by both models of cosmopolitanism – liberal and Marxist - during the Cold War, albeit each informed by very different ideological presuppositions.

But this has not proven to be the case. We can point to several pieces of evidence that suggest national attachments have not disappeared and indeed remain strong, even in Europe. If it is the case that the state is losing much of its purchase as exclusive site for normative control (and I will return to and in some respects contest this point below), it is a curious trend that the nation remains strong as the primary site of identity and loyalty for citizens and that in some respects it seems to be enjoying something of a renaissance. Many have expected European integration to lead inevitably to a redrawing of popular attachments with the prospect of a newly emerging polity that promises to replace the divisive, polarising and historically contingent nations of the continent. But it is clear national attachments have not dissipated, even in ‘EU’rope.

Another factor has been the emergence of national identity as a key player in the collapse of the USSR and SFRY. There were of course complex political dynamics at work as these states dissolved, including popular revolt against oppressive governments, but the strength of national feeling expressed in so many republics and reiterated in overwhelming referendum turnout and votes for independence cannot be denied.¹⁹ This also extended to national reawakening in the Soviet satellite states of Eastern Europe. And we continue to see situations where subordinate peoples have retained an attachment to their own national community and an aspiration for self-determination, even in the face of overwhelming oppression. This is evident in the recent moves towards independence by Montenegro and Kosovo²⁰, recent and ongoing acts of decolonisation in East Timor and New Caledonia respectively, the emergence of Eritrea and Southern Sudan as states, and the struggles of the Palestinian people and the Sahrawis of Western Sahara for statehood.

While again, as in the post-communist era, it might be argued that these developments have more to do with resisting oppression than nationalism, another, and for many a perplexing phenomenon, has been the resilience and indeed strengthening of national identities among sub-state regions within relatively prosperous and harmonious states such as the UK, Canada, Belgium and Spain. Although this phenomenon has led to strong autonomy regimes for sub-state nations, perhaps paradoxically this institutional accommodation has in some cases at least not quelled the political and constitutional aspirations for greater accommodation and has perhaps re-energised political nationalism within certain territories.²¹

Nationality (New York, Oxford University Press, 1995); M Ignatieff, *The Warrior's Honour: Ethnic War and the Modern Conscience* (New York, Metropolitan Books, 1998); T Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford, OUP, 1999).

¹⁹ S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford, OUP, 2012), ... -

²⁰ S Tierney, ‘The Long Intervention in Kosovo: a Self-Determination Imperative?’, James Summers ed., *Kosovo and International Law* (Leiden, Martinus Nijhoff, 2011) 249-278.

²¹ The respective levels of sub-state national identity and its connection to aspirations for independence is uneven from one territory to another. For example, the sovereignty movement in Quebec is currently weak, whereas in Scotland it has strengthened in recent years.

We also see on the international plane a proliferation of instruments designed to protect minorities, minority languages etc. The national identities of sub-state peoples who have no realistic opportunity or desire for statehood or for territorial transfer to a kin state remains strong, and the accommodation of these identities remains an issue for international law both at general²² and regional levels.²³ These regimes are at an early stage of development and remain weak. But time will tell if they help foster nationalist claims in the developing world where sub-state national groups are now beginning to advance claims to territorial accommodation similar to those in Canada and Western Europe.²⁴

Another phenomenon we have seen is the spread of direct democracy as a means of settling major constitutional issues including sovereignty matters, which has provided a real instantiation of the connection between sovereignty as power and sovereignty as democratic legitimacy. The rise of the referendum within the modern democratic state has many causes and offers many implications for the functioning of representative government, but one consequence which is particularly relevant for this chapter is the way in which the referendum provides colonised, subordinate and minority nations with a vehicle to voice their discrete national identities and aspirations. We see this in the key role the referendum has played in leading to independent statehood in Eastern Europe, in East Timor, Eritrea and in Southern Sudan, and in constitution building in Iraq and elsewhere. It is also notable how the international community has fostered the referendum to facilitate expressions of national self-determination in recent years, and in a way that was not deployed in the earlier self-determination processes of 1919 and the 1950s-1960s. This is partly through the hands-on engagement in particular peace-making or constitution-building processes (Eritrea 1993, Iraq 2005, Montenegro 2006 and South Sudan 2011) and partly through more general processes of norm creation through the issuing of guidelines e.g. by the Council of Europe's Commission for Democracy Through Law (Venice Commission).²⁵ Referendums have also been used in moves towards national autonomy in Spain and the UK, and it is no surprise that nationalists in these territories and in Quebec have attempted or are now attempting to stage their own referendums on independence, sovereignty etc.

There is also evidence that these referendums can be nation-affirming if not directly nation-building; in other words, the direct manifestation of a people in an act of collective self-determination is not only a constitutional moment, it is a national moment. National identity if it means anything constitutes the ongoing imagined collective consciousness of a nation's members. It is the lived attachment of a group of people in the same polity specifically to one another, and it is consolidated not only

²² United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; UN Declaration on the Rights of Indigenous Peoples (adopted 14 September 2007).

²³ Council of Europe Framework Convention for the Protection of National Minorities; European Charter for Regional or Minority Languages; OSCE Copenhagen Document of 1990.

²⁴ W Kymlicka and M Opalski eds., *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford, OUP, 2002); B Berman, D Eyoh, and W Kymlicka eds. *Ethnicity and Democracy in Africa*, (James Currey Publishers and Ohio University Press, 2004); W Kymlicka and B He eds., *Multiculturalism in Asia* (Oxford, OUP, 2005); J Castellino and E Dominguez Redondo, *Minority Rights in Asia* (Oxford, OUP 2006).

²⁵ European Commission for Democracy Through Law (Venice Commission) Code of Good Practice on Referendums, CDL-AD (2007) 008 rev, Council of Europe Strasbourg, 20 January 2009.

through the everyday plebiscite of a shared and lived political experience, but also and increasingly by ‘every so often plebiscites’, i.e. real acts of collective, popular deliberation concluded at the ballot box. One paradox here is the use of referendums on EU integration, which perhaps threaten to have the opposite of the effect intended.²⁶ Citizens from discrete nations come together in an act of popular sovereignty but the issue at stake is the transfer part of that sovereignty to a supranational body. And what we see from these processes is that not only does the nexus between state and popular legitimacy remain strong but so too do national attachments in Europe. To take Ireland for example, referendums have been used for all of the significant treaty processes. And it has been a bumpy ride, with evidence that over time Euroscepticism has steadily been growing.²⁷ This can be seen in the rise of the No vote: 17% on accession in 1972; 30% in 1987 (Single European Act); 31% in 1992 on the Treaty of European Union; 38% in 1998 on the Amsterdam Treaty; and finally rejection of the Treaty of Nice in 2001. Following a minor concession by way of the Seville Declaration recognising Ireland's policy of military neutrality, a second referendum was held and the Nice Treaty was eventually accepted by Irish voters in 2002. But the more dramatic rejection was that of the Treaty of Lisbon in 2008, intensifying as it did the shockwaves still reverberating from the failure of the draft Constitutional Treaty. Once again the Irish government negotiated minor compromises and Lisbon was eventually accepted by the Irish people in 2009. The popular rebellions against both the Constitutional Treaty and the Lisbon Treaty in states where referendums were held seem to bear this out.²⁸

There remains the question, however, whether the opprobrium heaped upon nationalism is not having an effect. The image of nationalism we were left with after the age of Fascism and National Socialism should surely have diminished nationalism and national identity in an age when liberalism with its cosmopolitan aspirations hold sway.²⁹ But in fact what we have seen is that the revival of national identity in the past few decades has brought with it a new turn in scholarship which calls into question the 20th century stereotype of the nation as backward and out-dated. This new work across a range of disciplines questions the caricature of the nation and national identity as undemocratic, dangerous and unfit for purpose in an age of state transformation.

We saw the first challenge to the stereotype in the work of sociologists who have since the 1960s demonstrated the resilience of national identity and surprisingly the strengthening of it particularly at the sub-state level within democratic, liberal,

²⁶ M Shu ‘Referendums and the Political Constitutionalisation of the EU’ (2008) 14 *European Law Journal* 423.

²⁷ J O’ Brennan, Ireland says No (again): the 12 June 2008 Referendum on the Lisbon Treaty, *Parliamentary Affairs* Vol. 62 No. 2, 2009, 258–277, 274.

²⁸ Qvortrup on the first Irish Lisbon referendum concluded that ‘the voters, while not opposed to the EU as such, were unhappy with further integration or transfer of sovereignty.’ M Qvortrup, ‘Rebels without a Cause? The Irish Referendum on the Lisbon Treaty’, (2009) 80 *Political Quarterly* 59–66, 65. Schuck and De Vreese are among those who consider Euroscepticism among the Dutch electorate to be a more significant factor behind the No vote on the Reform Treaty than domestic, second order issues: A Schuck and C De Vreese, ‘The Dutch No to the EU Constitution: Assessing the Role of EU Skepticism and the Campaign’, (2008) 18 *Journal of Elections, Public Opinion & Parties* 101–128, 120; R Sinnott, ‘Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice’ (2003) University of College Dublin Working Papers <<http://www.ucd.ie/dempart/workingpapers/nice2.pdf>> accessed 10 October 2011.

²⁹ T. Franck op. cit.

tolerant states. Sociologists have found national identities to be resilient, but they have also found them not to be particularly thick with markers of membership based decreasingly on ethnic markers and more on civic models of belonging.³⁰ They have also found that national identity remains strong even as cultural distinctions within multinational states and around the world seem to diminish in an era of cosmopolitanism.³¹

Secondly, political scientists have addressed the constitutional aspirations of this new nationalism and found, contrary to many expectations, that political actors adopting the nationalist mantle are for the most part not backward-looking or reactionary, but espouse values wholly consistent with the plurality of opinion in modern, Western societies, for example on issues such as social welfare, citizenship and human rights.³² Furthermore, they have advanced political programmes that run largely with the grain of changing state power, supra-state integration, and internationalisation of previously monopolistic state functions; nationalists in Scotland, Catalonia and Quebec situate themselves within the context of their respective integrating continents in ways similar to state nationalists, and in some ways are in fact more pro-integrationist.³³ In other words, the new nationalism was found to fit wholly consistently within the 'progressive' trend of modern politics, weakening the negative stereotype with which nationalism has been tarnished.

And thirdly we find in political theory, including perhaps surprisingly liberal political theory, a subtle turn that has served to question the notion that nationalism and liberalism are inherently incompatible. Rather political philosophers, most comprehensively Will Kymlicka, have found the aspirations of these national groups to be wholly consistent with liberalism and have in fact argued that liberalism has a duty to accommodate these political and constitutional aspirations if it is to be true to its own values of liberty and equality.³⁴ It is only in the context of individual people's societal culture that they can advance their own life goals in a fulfilled way, achieving the liberal goals of equality and liberty.³⁵

Therefore, just as in empirical terms national identity has shown itself to remain strong, within the social sciences there is considerable evidence that it is also

³⁰ D McCrone, *Understanding Scotland: The sociology of a nation*, 2nd edn. (London, Routledge, 2001).

³¹ The ever closer alignment of values among nations within states at the same time as nationalist sentiment within these nations grows has been called 'de Tocqueville's paradox' by Stephane Dion. S. Dion, 'Le nationalisme dans la convergence culturelle: le Québec contemporain et le paradoxe de Tocqueville', in R. Hudon and R. Pelletier, (eds) *L'engagement intellectuel : Mélange en l'honneur de Léon Dion* (Québec, Presses de l'Université Laval, 1991).

³² M Keating, *Nations Against the State – The New Politics of Nationalism in Quebec, Catalonia and Scotland*, 2nd edn. (UK, Palgrave, 2001); A-G Gagnon & J Tully (eds) *Multinational Democracies* (Cambridge, Cambridge University Press, 2001).

³³ M Keating, *Plurinational Democracy: stateless nations in a post-sovereignty era* (Oxford, OUP, 2001).

³⁴ W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, OUP, 1995); M Moore, 'Normative Justifications for Liberal Nationalism: justice, democracy and national identity', (2001) 7 *Nations and Nationalism* 1-20; F. Requejo (ed) *Democracy and National Pluralism* (London, Routledge, 2001).

³⁵ W Kymlicka, *Politics in the Vernacular* (Oxford, OUP, 2001); S Tierney, 'The Search for a New Normativity: Thomas Franck, Post-Modern Neo-Tribalism and the Law of Self-Determination' (2002) *European Journal of International Law* 941-960.

adaptable, and can remain fit for purpose in an internationalising world. And if it is the case that national identities remain resilient, with people finding primary identity in their societal cultures, while open to the opportunities a cosmopolitanising world has to offer, what of the state?

The resilience of the state

Here again rumours of the state's demise seem to be over-stated. The resilience of the nation and national identity cannot be detached from the ongoing functional role of the state, and 'statal public law' is still required to service this nexus.

We do of course need to observe that the normative order in which states exist has changed greatly; the state is no longer the exclusive resource through which public power is facilitated and restrained. In Europe with its particularly sophisticated supranational apparatus there is no doubt that the particular manifestation of European public law, to facilitate the monopolistic public power of the sovereign state is changing. But from a European perspective it is easy to develop a skewed outlook and miss how strong the state is in other parts of the world. The state has not disappeared; arguably it remains strong even in Europe. And more broadly its function within the international legal environment remains crucial and pre-eminent.

Supranationalism and its diffusion

There are a number of ways in which we can re-emphasise the ongoing importance of the state. One is to observe that the proliferation of normative sites beyond the state in some ways, and perhaps paradoxically, reinforces the state's importance. Both the international community and the state in its dealings with it have become more porous, open to new actors, developing more accessible and in some ways transparent processes, and developing in turn new horizontal (state to state and non-state actor to non-state actor) and vertical (state to supranational institution and non-state actor to supranational institution) dynamics. Given this connection between the emergence of institutions which seem in some light to form the origins of a proto-global governance matrix we cannot conceive of these communities of states and the communities of non-state actors as somehow separable, particularly since individuals, NGOs and political movements within this 'supranational civil society' are increasingly able to access, and are structured in order best to influence, the communities of states and supranational institutions.

However, it may also be observed that this increasingly diverse set of relations makes the idea of a unified, central system of global government a less rather than a more realistic prospect. With the multiplication of institutions, agents and processes comes a wider diversification of sites of authority and a less clear hierarchical structure among actors within these sites and across normative sites themselves, giving the impression of 'governance without government'.³⁶ Recent normative clashes in cases such as Kadi³⁷ hint at a possible 'chaos theory'. In particular it is not clear how, if at all, the increasing interaction of and competition among international organisations

³⁶ KE Jorgensen and B Rosamund, 'Europe: a regional laboratory for a global polity?' in R Higgott and M Ougaard eds *Towards a Global Polity* (London, Routledge, 2000) 189-206.

³⁷ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (2005) E.C.R. II-3649.

and treaty bodies affects the simple architecture of the UN and its commitment to the equality of sovereign states.

Even the most advanced model of supranationalism, the EU, presents a very mixed picture of the prospects for macro-constitutional architecture beyond the state.³⁸ Certainly it seems to offer at least the beginnings of some type of transnational community of individuals, or even a proto-form of state itself. But if this is the ultimate goal, there remain considerable political and constitutional obstacles facing such supranational state-building projects which did not confront the first modernist wave of nation-building in the late 18th-19th centuries.

The end of coercive nation-building

It should not be over-looked that the Westphalian order was built largely by coercion. 18th and 19th century (as well as post-colonial) nation-building was often imposed from on top with no democratic political traditions in place to generate resistance. State-building elites had a much freer hand in over-riding the niceties of pluralism, respect for national minorities, linguistic diversity etc. than governments today which are generally dependent upon popular consent. It is difficult to see how new normative orders can deploy such an aggressive approach, at least directly. There are attempts of course, such as the refusal to take No for an answer in the empire-building referendums of the EU. But on the other hand the recent referendums in Ireland, France and the Netherlands show that the political and at some level consensual road to integration will only allow such a top-down approach to proceed so far. And with the referendum a stronger part of many constitutions the future road to further integration looks potentially rocky. Another possible avenue is economic dependence. We have seen how the recent economic crisis in Greece and the danger this poses to the Euro has led powerful actors within the EU to move for further political integration as a way of exerting further economic control throughout the Eurozone.

Also the new nation-states of the post-enlightenment period often replaced antiquated, undemocratic relics of feudalism, and so the normative argument for the new, proto-democratic state was more easily made (where it even had to be) in cases of imposition. Also other new nations were born from popular revolutions and grew a new national identity from this fertile solid. But today the supra-nation or supra-state entities seek a place alongside or in place of often well-established and reasonably contented national democracies. And so the attractiveness of supra-state centralisation is often less than self-evident from a democratic perspective.³⁹ Although earlier periods of nation-building were often taken to be politically progressive, and as such they attracted political support across the political spectrum, this is not always the case with globalisation or further integration in Europe, each of which face popular opposition at the vernacular and even cosmopolitan levels, from left and right. A recent example again is the left wing backlash against the economic austerity imposed upon Greece by the European Union.

³⁸ JHH Weiler and M Wind, *European Constitutionalism Beyond the State* (Cambridge, CUP, 2003).

³⁹ It is also notable that post-war decolonisation movements when they sought to centralise power were often unsuccessful. Many secessionist movements quickly developed resulting in bloody civil wars, and almost every post-colonial federation constructed in Asia, Africa, and the Caribbean before independence collapsed into their constituent ex-colonial parts soon afterwards. As Jackson notes: 'Societas Europe and not federalist America was the wave of the future almost everywhere in the world after 1945.' R Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford, OUP, 2003) 346. It is certainly ironic that the one exception to this has been Europe itself.

Finally, in the 18th and 19th centuries warfare played a huge part in uniting disparate communities within the state in order to resist external threats; there was no shortage of regional enemies who provided a ready-made source for a new patriotism; the development of militaristic Prussian nationalism as a vital resource in forging 19th century German identity is a good example. We await to see whether attempts to construct elaborate supranational governmental structures such as a deeper EU will in time seek to harness a defensive mentality in relation to the outside or aggressiveness and the instillation of an ‘us’ and ‘them’ mentality. This has not been particularly evident hitherto although the hardening of a western, liberal, civic European identity in the face of Islamic extremism or even internal dissent may provide one analogous, and unfortunate, context for the development of a nascent European supranational identity.⁴⁰

International law and the pre-eminence of the state

Moving beyond the EU arena, one of the consequences of a ‘EU’ro-centric perspective is that we can overlook the fact that under international law the state still retains unrivalled privileges and that a number of sub-state peoples aspire to join the club of states. Certainly the number of states is increasing as we see in recent times with the emergence of Montenegro and the other recent states mentioned earlier. It also seems to be getting easier to become a new state. Kosovo’s seemingly inevitable move to statehood may well set a precedent that was not anticipated by the tight rules on decolonisation or by the *uti possidetis* rule as applied by the EC Guidelines on Recognition for the former Yugoslavia.⁴¹ It remains to be seen how other territories will try to apply the Kosovo case in the making of sovereignty claims.

At the level of privileges we should not overlook the resilience of the external dimension of state sovereignty. States retain a monopoly of control on the law-making process within international law. And crucially a monopoly also over the rules of membership. Very few new members of the club emerge without prior international authorisation. New states have tended to have their access mediated through well-regulated channels of recognition, external oversight etc. Even Kosovo enjoys authorisation of sorts, by virtue of the delay in determining final status under Security Council Resolution 1244 which, by being overtaken by events on the ground, led in the end to a *fait accompli*, and one which the great powers could be said to have facilitated indirectly by their ambiguous attitude to Kosovan statehood since the draft Rambouillet Accord in 1999.

Another privilege is that states retain very high levels of autonomy in treaty-making. Much is made of the roles of new actors in law-making processes, but in fact states enjoy an overwhelming monopoly in these processes with the access of NGOs to such processes limited and highly attenuated.⁴² Even when offered the highest levels of involvement – e.g. within the drafting council that led to the Statute of the ICC – NGOs still lacked any voting power. Even the EU treaty process largely follows the international principle of the sovereign equality of states. Also non-state entities do not in general have personality before international tribunals etc. And the state

⁴⁰ S Tierney, ‘Rights versus Democracy? The Bill of Rights in Plurinational States’, in C Harvey and A Schwartz, eds., *Bills of Rights in Divided Societies* (Oxford, Hart Publishing, 2012),

⁴¹ J Summers ed., *Kosovo and International Law* (Leiden, Martinus Nijhoff, 2011).

⁴² A Boyle and C Chinkin, *The Making of International Law* (Oxford, OUP, 2007) 62-77, 93-97.

remains the only viable institution to which to ascribe responsibility; in other words it is to the state and the state alone that actors must turn for the enforcement of international obligations.

It is also notable that the sovereignty of a particular state cannot be terminated. Its functional use may decline or elements of it be surrendered as they have in the EU, but the state's lawful competence cannot be forcibly removed. We see this when we reflect that although many new states have been created since 1945 very few have disappeared. Another way in which state existence is guaranteed is through prohibition of the use of force. It is very difficult for states to use force against other states without facing international opprobrium. Even when they seek to secure Security Council authorisation this is difficult as we saw ahead of the invasion of Iraq, and the level of criticism faced by the USA and UK over this conflict must surely act as a deterrent. Ironically it would seem that the Security Council has been strengthened through its refusal to endorse this action, even though the action went ahead anyway. This is another aspect of the growth of democratisation. Just as it is more difficult to forge a nation internally by coercion, so too is it more difficult to forge internationalism of empire externally by conquest.

It should also be noted that although the government of Iraq was overthrown Iraq itself has not disappeared. A term that has entered the international relations vocabulary in recent times is 'failed state'. But this is a misnomer; states don't fail, governments and institutions do. Indeed it is testimony to state resilience that pathological political situations in recent years that have overtaken Rwanda, Cote D'Ivoire, Liberia etc. have not led to state collapse.

It is therefore important to restate that international law still massively prioritises the state – nation nexus. And although individual human rights is expanding, the enforcement of these is highly variable from region to region, and in many respects still depends upon the filter of state consent.⁴³ We should also note how weakly international law protects minority rights both within Art 27 ICCPR which offers so many concessions to state power, and to the very general and non-prescriptive terms of specific instruments on minority rights. International law may become a greater focus for disgruntled minorities in the coming decades in attempts to go behind the veil of statehood, but for now the state and its dominant nation are the key players in the international arena. And indeed the lesson for minorities seems to be – become a state if you want international status, do not wait for either the end of statehood or international recognition of regional government.⁴⁴

V. The changing functionalism of the nation

The state is still with us and so is the nation, and it seems that each continues to feed on the vitality of the other. But this is also a complex, symbiotic and mutually reinforcing relationship. Public law in its modernist functionalism as the resource that has managed and sustained this relationship is therefore more than alive. Insofar as the state's role is changing, and in some cases that role is diminishing as it is in

⁴³ K McCall Smith, 'Reservations to Human Rights Treaties', PhD thesis, University of Edinburgh 2011.

⁴⁴ It is often noted for example that the weakness of EU Committee of the Regions leads sub-state nations to conclude there is no substitute for full membership which can only come with statehood.

Europe, public law is changing its environment. In other words, it is exercising the function of managing public power in new and diverse ways across multiple sites. In this sense it is analogous to energy in the natural world, it can change its state but does not disappear.

The bigger story is that we can be distracted by the tale of globalisation and even of privatisation. The state too is adapting to change as it always has. We are reminded of Carr's comment: 'We nod approvingly today when someone tells us that, whereas the State used to be merely policeman, judge and protector, it has now become schoolmaster, doctor, house-builder, road-maker, town-planner, public utility supplier and all the rest of it.'⁴⁵ Some of these functions change, but the state today, even in Europe, retains functions considerably stronger than those exercised one hundred years ago, including additional regulatory functions it did not exercise even in Carr's time. And some states are getting stronger; there is a renewed vitality in large states in particular.⁴⁶ And so it should perhaps be no surprise that sub-state national groups recognise the inherent privileges states possess. Indeed there is perhaps no stronger indication of the state's strength than the appetite among sub-state peoples to create new ones and the fact that once created states rarely disappear.

And in this sense resilient too is the nation. National attachments remain strong, the past forty years has seen the re-emergence of nascent national identities and their consolidation, even as cultural markers of distinction seem to diminish. The key seems to be legitimacy, and in particular the democratic imperative which is also spreading at the same time as the world globalises. Economic forces may undermine some functions of the state, but it does remain the only vehicle that hosts popular government; and it is in this function, offering vernacular legitimacy for government, that the state retains its strength. And public law which has been developed in such subtle ways over the past century, crafting institutions that both facilitate and restrain the popular will of the people, remains central to our understanding of the public space. The function of modern constitutionalism is to serve the democratic relationship between the state and the nation, and while both are with us as they assuredly still are, so too will be public law.

⁴⁵ C. Carr, *Concerning English Administrative Law* (Oxford, OUP, 1941) 10–11.

⁴⁶ 'one expects an Asia-dominated international law to emphasize traditional concerns of sovereignty, non-interference, and mutual cooperation rather than the constitutionalist vision of supranational institutions reaching deep into the way states govern themselves and treat their own populations.' T Ginsburg, 'Eastphalia as a Return to Westphalia', (2010) 17 *Indiana Journal of Global Legal Studies* 1.